

# What to Do with Difference: The ADA, Special Education, and Disability

ALAN GARTNER\*

*The Americans with Disabilities Act was enacted to protect individuals with a disability from discrimination in the workplace. The ADA, though, does not cover special education programs designed for children with disabilities in school settings. This has led to many negative results for children with disabilities.*

*In this article, the author argues that by focusing on the student's disability in the classroom, we are actually impairing the student's chances to look past his disability and see himself as an individual who can make a positive contribution to society. Rather we need to provide an environment that fosters learning for all students so that each student has an equal opportunity to excel.*

## I. INTRODUCTION

The linking of the Americans with Disabilities Act (ADA)<sup>1</sup> and special education<sup>2</sup> is obvious and appropriate, yet limited and confounding. It is obvious because both concern individuals with disabilities. It is appropriate because both resulted from advocacy efforts: the ADA largely from within the community of persons with disabilities, and special education from the parents of children with disabilities.<sup>3</sup> The linking is limited because the ADA's boundaries are explicit: it covers areas such as employment, transportation, voting, public access, and telecommunications, but not education. And the linking is confounding because few see special education as a matter of civil or disability rights.<sup>4</sup> This myopic separation

---

\* National Center on Educational Restructuring and Inclusion; The Graduate School and University Center, The City University of New York

<sup>1</sup> 42 U.S.C. §§ 12101–12213 (1994).

<sup>2</sup> Special education will be equated with the programs of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1487 (1994 & Supp. IV 1998) [hereinafter IDEA].

<sup>3</sup> For an excellent comprehensive history of the passage of section 504 of the Rehabilitation Act of 1973, see RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 45–55 (1984). See JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 105–41 (1994) for a detailed description of both the people and events leading up to the signing of the ADA in 1990. For an overview of the Education for All Handicapped Children Act from the perspective of a key congressional staff member, see Lisa J. Walker, *Procedural Rights in the Wrong System: Special Education Is Not Enough*, in IMAGES OF THE DISABLED, DISABLING IMAGES 97, 97–115 (Alan Gartner & Tom Joe eds., 1987).

<sup>4</sup> For a description of the connection between traditional civil rights issues and the education of students with disabilities, see Thomas K. Gilhool, *The Right to an Effective Education: From Brown to PL 94-142 and Beyond*, in BEYOND SEPARATE EDUCATION 243, 243–53 (Dorothy Kerzner Lipsky & Alan Gartner eds., 1989).

of civil rights and special education negatively impacts special education programs<sup>5</sup> and children with disabilities.<sup>6</sup> Furthermore, the emphasis on the "special" nature of children with disabilities has, until recently, excluded them from the broad efforts of educational reform.

Part II of this article presents several assertions about the education of students with disabilities, providing a framework with which to understand the issues involved. Part III describes the state of special education, highlighting the difference between the ADA and special education law. Part IV concludes by noting fundamental commonalities between the ADA and special education law.

## II. ASSERTIONS REGARDING EDUCATING STUDENTS WITH DISABILITIES

This article's assertions regarding educating students with disabilities can be divided into three categories: (A) language and what it represents; (B) understanding and responding to educational impairment; and (C) teaching and learning, the practice of pedagogy.

### A. *Language and What it Represents*

What are the terms typically used to describe special education students and students with disabilities?<sup>7</sup> Each is problematic, ranging from the seemingly benign to the saccharin to the offensive: different learner, differently abled, disabled, deficient, lazy, slow, dumb, incorrigible.<sup>8</sup> Labels must change if we are to effectively

---

<sup>5</sup> For an alternative vision of special education from the perspective of a disability rights scholar and advocate, see Harlan Hahn, *New Trends in Disability Studies: Implications for Educational Policy*, in *INCLUSION AND SCHOOL REFORM: TRANSFORMING AMERICA'S CLASSROOMS* 315-28 (Dorothy Kerzner Lipsky & Alan Gartner eds., 1997).

<sup>6</sup> For an incisive treatment of attitudes about children with disabilities, and the resulting impact on education, see Adrienne Asch, *Has the Law Made a Difference?: What Some Disabled Students Have to Say*, in *BEYOND SEPARATE EDUCATION*, *supra* note 4, at 181-205.

<sup>7</sup> In fact, or least in law, "special education students" and "students with disabilities" are not quite synonymous. Like Public Law No. 94-142, the IDEA requires that, for eligibility for special education services, a student both be disabled (per the specified categories of the law) *and* be in need of special education services. Neither disability nor a need for special services is alone sufficient to establish eligibility.

<sup>8</sup> Particular groups of persons with disabilities have a similar set of pejorative labels applied to them. For example, the following emotional traits have been used in the professional literature to refer to deaf people: depressive, emotionally disturbed, emotionally immature, lacking in empathy, explosive, easily frustrated, irritable, moody, neurotic, paranoid, passionate, temperamental, and unfeeling. See Harlan Lane, *Is There a "Psychology of the Deaf?"*, 55 *EXCEPTIONAL CHILD* 7, 9 (1988). For a far-ranging treatment of how schools labeled children prior to Public Law No. 94-142, see Joseph L. Tropea, *Structuring Risks: The Making of Urban School Order*, in *CHILDREN AT RISK IN AMERICA* 58, 58-88 (Roberta Wollons ed., 1993).

integrate students with disabilities into the mainstream of society.

In our language, and hence our thinking, we often confuse tools with outcomes. For example, when a high school teacher is confronted with the proposition that a student with a disability be included in her class, she may say she cannot successfully include the student, because he only reads at the "fourth" grade level. Here, the tool of reading is confused with the desired outcome of learning. The student could use other tools to effectively learn, such as listening or seeing. For example, both the vision impaired and those who see clearly can learn by listening to taped books. Sign language can be used to teach both the deaf and those who hear clearly. The following quote aptly illustrates the point:

Sight is enjoyable; . . . it is convenient. But that is all that it is—enjoyable, useful, convenient. Except in imagination and mythology it is not . . . the single key to human happiness, the road to knowledge, or the window to the soul. Like the other senses, it is a channel of communication, a source of pleasure, and a tool—nothing less, nothing more. It is alternative, not exclusive. It is certainly not the essential component of human freedom.<sup>9</sup>

Nora Groce made a parallel point in her remarkable portrait of Martha's Vineyard, when it was home to the largest concentration of people who were deaf:

Most Vineyarders remembered that those who were deaf regarded their inability to hear as a nuisance rather than an overwhelming problem. [Key to this reaction was the fact that most Vineyarders, both deaf and non-deaf, "spoke" sign.] Most, when pressed on the point, believed that local people, hearing or deaf, preferred to have hearing children, but the birth of a deaf child was regarded as a minor problem rather than a major misfortune.<sup>10</sup>

In addition, attitude and perspective are often confused. Adrienne Asch, commenting on a paper prepared by the National Association for Sickle Cell Disease, amplifies this point.

Striking about the position paper is its matter-of-fact treatment of the topic. Its message: part of being black is knowing that a small percentage of individuals carry the gene for the trait and a smaller percentage have the disabling condition. The discussion neither exaggerates nor minimizes the consequences of the condition . . . . Suppose Down syndrome, cystic fibrosis, or spina bifida were depicted not as an incalculable, irreparable tragedy but as a fact of being human?<sup>11</sup>

---

<sup>9</sup> Kenneth Jernigan, *Blindness: The Pattern of Freedom*, THE BRAILLE MONITOR, Aug.–Sept. 1985, at 387.

<sup>10</sup> NORA ELLEN GROCE, *EVERYONE HERE SPOKE SIGN LANGUAGE* 53 (1985).

<sup>11</sup> Adrienne Asch, *Reproductive Technology and Disability*, in *REPRODUCTIVE LAWS FOR THE*

### B. *Understanding and Responding to Educational Impairment*

A building is inaccessible to an individual with an orthopedic impairment because of a decision to build stairs rather than a ramp. So it is with various handicapping conditions. The failure to provide material in alternative formats, such as Braille and taped books, disables the student with limited vision. Similarly, a school that presents curricula in only one way or arranges its chairs in accordance with a regimented culture disables the student who has a learning disability, emotional disturbance, or mental retardation. Providing classroom accommodations and modifications, which the IDEA calls "supplemental aids and services," enables both student and teacher to address, mitigate, and ultimately overcome the consequences of an impairment, thus creating an environment that is less disabling or even no longer disabling at all. In an incisive turning of the tables, Hahn writes:

[C]hairs are an accommodation to the needs of nondisabled students: but they are of no value to many disabled persons. Without chairs, nondisabled students would undoubtedly become fatigued from standing or sitting on the floor, they would probably be discouraged from attending classes, and their performance on tests and other evaluations might be adversely affected.<sup>12</sup>

*Board of Education v. Rowley*<sup>13</sup> defined the extent to which schools had to accommodate students with disabilities under the Education for All Handicapped Children Act of 1975 (Act), which required recipient states to assure students "the right to a free appropriate public education."<sup>14</sup> The Supreme Court interpreted that language in *Rowley*, holding that the recipient state satisfied the requirement by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."<sup>15</sup> The Act, however, did not require the state "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children."<sup>16</sup> Thus, *Rowley* has traditionally been understood as affirming the constitutionality of the Act, while limiting the rights of students to a sufficient education rather than an education of maximum potential.

The Court should have focused on the entire class, rather than on Amy, the student identified in the lawsuit. Martha Minow, going beyond the facial issues of the

---

1990s, at 69, 87 (Sherrill Cohen & Nadine Taub eds., 1989).

<sup>12</sup> Harlan Hahn, *New Trends in Disability Studies*, in *INCLUSION AND SCHOOL REFORM*, *supra* note 5, at 321.

<sup>13</sup> 458 U.S. 176 (1982).

<sup>14</sup> 20 U.S.C. §1412(1) (1994).

<sup>15</sup> *Rowley*, 458 U.S. at 203.

<sup>16</sup> *Id.* at 200.

decision, writes that "both sides assumed that the problem was Amy's: because she was different from other students, the solution must focus on her."<sup>17</sup> Instead, however, one can conceptualize the class as a learning community, shifting the focus from Amy's disability to a remedy involving all of the students.

After all, if Amy [is deaf and] cannot communicate with her classmates, they cannot communicate with her, and all lose the benefit of exchange. Moreover, conducting the class in sign language would engage all the students in the difficult and instructive experience of communicating across traditional lines of difference. All the students could learn to struggle with problems of translation and learn to empathize by experiencing firsthand discomfort with an unfamiliar mode of expression. It would be educational for all of them to discover that all languages are arrangements of signs and to use group action to improve the situation of an individual.<sup>18</sup>

### C. *Teaching and Learning: The Practice of Pedagogy*

The traditional concept of education presents the teacher as a possessor of knowledge that is delivered to the student. The teacher actively delivers the knowledge, while the student passively receives it. A contrary view is that of the student doing the work of learning, constructing the knowledge.<sup>19</sup> The contrary view supports a more active role for learners, rather than the passive "chalk and talk" model found in the traditional classroom. For example, it supports such pedagogical strategies as peer and cross-age tutoring programs, with the recognition that the tutor also gains particular benefit.<sup>20</sup> And it allows a student with disabilities to play the honored role of tutor, instead of always being the tutee.

Intelligence has been traditionally understood as a singular and universal characteristic, identified by the psychologists as "G," and expressed in an IQ score. However, intelligence is a much broader characteristic. In his pathbreaking work, Howard Gardner has argued persuasively that intelligence, understood as culturally derived problem-solving skills, is both multiple and culturally embedded. In this light,

---

<sup>17</sup> MARTHA MINOW, MAKING ALL THE DIFFERENCE 82 (1990).

<sup>18</sup> *Id.* at 84.

<sup>19</sup> The concept of "consumer as producer" applies throughout the human services. For example, while the therapist may counsel the patient, the patient does the work of (re)gaining health. Victor Fuchs first developed this concept. For a full treatment of the idea and its application to enhance the effectiveness of the human services, see ALAN GARTNER & FRANK RIESSMAN, THE SERVICE SOCIETY AND THE CONSUMER VANGUARD (1974).

<sup>20</sup> See ALAN GARTNER, ET AL, CHILDREN TEACH CHILDREN 1, 5 (1971). For the application of these concepts to the education of students with disabilities, especially the benefits that they can gain in the role of "tutors," as well as "tutees," see Alan Gartner & Dorothy Kerzner Lipsky, *Students as Instructional Agents*, in SUPPORT NETWORKS FOR INCLUSIVE SCHOOLING: INTERDEPENDENT INTEGRATED EDUCATION 81, 81-94 (William Stainback & Susan Stainback eds., 1990).

he points out that educational programs that address only one of these multiple intelligences limit, if not preclude, the learning opportunities of persons with other intelligences.<sup>21</sup>

### III. SPECIAL EDUCATION

In its summary of the final regulations of the IDEA Amendments of 1997, the U.S. Department of Education stated, "Prior to 1997, the law did not specifically address general curriculum involvement of disabled students."<sup>22</sup> Framed by this extraordinary statement, which raises the question of what it did address, we turn first to a discussion of special education in the quarter of a century following the passage of Public Law No. 94-142 in 1975, and then to a discussion of the changes that evolved during that period, many of which are expressed in the reauthorized IDEA.

Recognizing the importance of education—and its denial to hundreds of thousands of children with disabilities—parents and other advocates followed the example of the Black civil rights movement and sought relief in both the federal courts and Congress. In an ironic and prescient observation, John W. Davis, in his opening statement on behalf of a defendant in *Brown v. Board of Education*, South Carolina School District, stated:

May it please the Court, I think if the appellants' construction of the Fourteenth Amendment should prevail here, there is no doubt in my mind that it would catch the Indian within its grasp just as much as the Negro. If it should prevail, I am unable to see why a state would have any further right to segregate . . . on the ground of sex or on the ground of age or on the ground of mental capacity.<sup>23</sup>

Throughout the 1960s and into the 1970s, parents across the country testified before state legislatures. Some described the harsh reality of having their children excluded by the public schools. Others portrayed their anger at being provided only limited public school services or at having to pay for services that were free of charge to the parents of non-disabled children.

Laws in individual states chipped away at these problems, and between 1966 and 1974, a series of federal laws built system capacity. In addition, two federal court

---

<sup>21</sup> See HOWARD GARDNER, *FRAMES OF MIND* 3–11 (1983). For an analysis of the negative impact that the traditional definition of intelligence has on education, see Jennifer Goldman & Howard Gardner, *Multiple Paths to Educational Effectiveness*, in *BEYOND SEPARATE EDUCATION*, *supra* note 4, at 121–39.

<sup>22</sup> Assistance to the States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406 (Mar. 12, 1999) (codified at 34 C.F.R. pts. 300, 303 (2000)).

<sup>23</sup> ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–55, at 51 (Leon Friedman ed., 1969).

decisions recognized that many disabled children were being denied an education. In 1971, *Pennsylvania Association for Retarded Children v. Pennsylvania*<sup>24</sup> overturned a state law that had relieved the commonwealth from educating those children it found to be “uneducable and untrainable in the public schools.”<sup>25</sup> And in 1972, *Mills v. Board of Education*<sup>26</sup> held that schools could not use the excuse of “insufficient funds” to exclude “exceptional” children from the public school system.<sup>27</sup>

A disorderly mix of state laws and local practices, along with growing pressure from parent advocates, influenced officials of the newly established Bureau of Education for the Handicapped to support the 1974 amendments to the Elementary and Secondary Education Act.<sup>28</sup> The amendments contained most of the principles of Public Law No. 94-142, lacking only that statute’s explicit time table and firm state requirements. The law’s title, “The Education For All Handicapped Children Act” is a clear reflection of the impact of *Pennsylvania Association for Retarded Children*.<sup>29</sup> School systems were no longer able to choose which children to educate, although the Act did provide states with the flexibility to choose whether to participate. All fifty states have done so, with New Mexico the last to join in 1984.

The following nine basic objectives are apparent in the Act: (1) establish the right of access to public education programs; (2) require the individualization of services rather than a “one size fits all” approach; (3) establish the assumption that disabled children need not be removed from regular classes; (4) broaden the scope of services provided by schools; (5) establish a process for determining the scope of services; (6) establish general guidelines for identifying disability; (7) establish principles for primary state and local responsibility; (8) clarify lines of authority for educational services; and (9) move beyond just staffing and training personnel.<sup>30</sup>

In many ways, the implementation of Public Law No. 94-142 stands as one of the great achievements in American public education. By the mid-1980s it had resulted in the following: (1) access for nearly all children with handicaps; (2) recognition and acceptance that students labeled as handicapped were entitled to an education; (3) implementation of due process procedural rights for students and their parents; and

---

<sup>24</sup> 334 F. Supp. 1257 (E.D. Pa. 1971).

<sup>25</sup> *Id.* at 1264.

<sup>26</sup> 348 F. Supp. 866 (D.D.C. 1972).

<sup>27</sup> *Id.* at 875-76.

<sup>28</sup> Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974) (repealed 1994).

<sup>29</sup> Testimony from education professionals asserted that some children were “uneducable.” Fortunately, Congress asserted its intention in the language of the Act, stating that “all handicapped children” should have available to them a “free appropriate public education.” Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3(c), 89 Stat. 773, 775 (1975) (codified at 20 U.S.C. §§ 1411 et seq. (1994 & Supp. IV 1998)). Thus, Congress believed in both the inherent learning capacity of children and the power of public education.

<sup>30</sup> For a full description of the principles of the law, see Walker, *supra* note 3.

(4) limited progress regarding "mainstreaming."<sup>31</sup> However, much less progress had been made regarding the quality of education provided. Despite the law's objective that students labeled as disabled not be removed from general education classes, a separate system of services for students with disabilities remained the norm.

If the law has been massively successful in assigning responsibility for students and setting up mechanisms to assure that schools carry out these responsibilities, it has been less successful in removing barriers between general and special education. P.L. 94-142 and other public policies of the time did not anticipate the need to take special steps to eliminate turf, professional, attitudinal, and knowledge barriers within public education. It did not anticipate the artifice of delivery systems in public education might drive the maintenance of separate services and keep students from the mainstream, that the resource base for special education and other remedial services would be constrained by economic forces, or that special education might continue to be dead-end programs in many school districts. Nor could it anticipate how deeply ingrained were our assumptions about the differences between students with learning problems and those without, and the substantial power of high (or, unfortunately) low expectations in learning.<sup>32</sup>

This separation can be seen as both cause and consequence of the limits in student outcomes.

Responding to concerns regarding student outcomes, continuing separation of special education, and growing costs, Madeleine Will, Assistant Secretary for the Department of Education, called for general and special educators to share responsibility for students with learning problems. Will's efforts, labeled the "Regular Education Initiative" (REI), were attacked by many special educators, both denying the need for change and arguing that general education would be neither willing nor able to serve students with disabilities. Although limited in scope to students with mild impairments, as the first major challenge to separate special education from within the federal government, the REI served to "break the ice" and thus provided an opening for substantive change. For example, William and Susan Stainback called for the merger of general and special education;<sup>33</sup> Douglas Biklen called for "integration in school and society;"<sup>34</sup> Dorothy Lipsky and I called for going beyond special education to a unitary and refashioned mainstream.<sup>35</sup>

---

<sup>31</sup>The word "mainstreaming" does not appear in the law. It is jargon used to refer to participation by students with disabilities in non-academic activities with their nondisabled peers.

<sup>32</sup> Walker, *supra* note 3, at 107.

<sup>33</sup> See William Stainback & Susan Stainback, *A Rationale for the Merger of Special and Regular Education*, 51 EXCEPTIONAL CHILD. 102, 102 (1984) ("[T]he time has arrived for special and regular education to merge into one unified system structured to meet the unique needs of all students.").

<sup>34</sup> DOUGLAS BIKLEN, *ACHIEVING THE COMPLETE SCHOOL* 174 (1985).

<sup>35</sup> Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, 57 HARV. EDUC. REV. 367, 367-68 (noting that we must move beyond



Summarizing these reform proposals, Nisbet wrote:

These initiatives departed from earlier reform attempts of mainstreaming and integration in their appreciation of the need for broader structural reform. Rather than adding on a new service, creating a new specialist, or identifying a new category of disability, these initiatives challenged underlying assumptions about students' learning and the established relationship between general and special education. They became the precursors to a movement that suggests that, rather than ever separating students on the basis of disability, all students should simply be included from the beginning of their schooling careers. Inclusion requires restructuring of both the assumptions and the organization of public education in this country.<sup>36</sup>

In the mid-1990s, Congress turned its attention to reauthorizing and improving the IDEA. It addressed matters of assumption and organization, bringing together, if not coupling in a causal relationship, concerns about limited student outcomes and the continuing separation of special education from the mainstream of schools and schooling.

The Individuals with Disabilities Education Act Amendments of 1997 (1997 Amendments) contain a series of findings that express Congress's purpose and approach.<sup>37</sup> The following are three ways in which Congress found that educating children with disabilities could be made more effective: (1) having high expectations for students and assuring access to the general curriculum;<sup>38</sup> (2) ensuring that special education become a service for such children rather than a place where they are sent;<sup>39</sup> and (3) providing incentives for whole-school approaches and pre-referral intervention.<sup>40</sup>

These conceptual "findings" become the basis for the programmatic requirements of the new law. Central among them are: students with disabilities are to be afforded access to the general curriculum, i.e., the curriculum offered to non-disabled students; to assure that such access is beneficial, students are to be provided needed modifications and supports; and in planning a student's individual program, a regular education teacher at the student's grade level is to participate. This is to bring to the table a person familiar with the general curriculum; students with disabilities, with few exceptions, are to participate in the general state-wide and

---

the current system to create a new type of unitary system that "incorporates quality education for all students").

<sup>36</sup> Jan Nisbet, *Education Reform: Summary and Recommendations*, in THE NATIONAL REFORM AGENDA AND PEOPLE WITH MENTAL RETARDATION: PUTTING PEOPLE FIRST 151-65, 152 (President's Comm. on Mental Retardation 1995) (citation omitted).

<sup>37</sup> Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 601(c)(5), 111 Stat. 37, 39-40 (1997) (codified at 20 U.S.C. §§ 1400-1491 (Supp. IV 1998)).

<sup>38</sup> *Id.* § 601(c)(5)(A).

<sup>39</sup> *Id.* § 601(c)(5)(C).

<sup>40</sup> *Id.* § 601(c)(5)(F).

district-wide programs of learning outcomes, with needed modifications; there is to be a presumption that students with disabilities will be served in the general education environment, with needed supplemental aids and services, for students and their teachers; and state funding formulas are to be modified so as to remove the incentive for placing students in more restrictive settings. The 1997 Amendments produced a remarkably changed IDEA. The following table compares New York City Public School programs<sup>41</sup> before and after the 1997 Amendments.

Pre-1997 Amendments	Post-1997 Amendments
Focused on special education services.	Focuses on strategies to maintain students in general education programs.
Avoided focusing on the integration of special education services in the general education environment.	Encourages a general education environment that includes an array of services designed to meet the needs of students with disabilities.
Relied on a system of labeling, categorizing, and placing students according to disability.	Emphasizes the unique attributes of each student by requiring noncategorical special education services.
Supported self-contained and segregated educational programs.	Supports developing and implementing innovative instructional models that increase the opportunities for students with disabilities to participate in the general education classroom.
Determined service placement according to category of disability; students often placed outside their home school district.	Determines service placement according to the unique needs of each student, emphasizing delivery in the home school district.

#### IV. ASSERTIONS, ATTITUDES, AND NEW SPECIAL EDUCATION PRACTICE

The changes made by the 1997 Amendments indicate recognition of institutional responsibility: they shift the focus from recognizing individual student differences and "impairments" to providing an environment attuned to student learning. This shift in focus indicates a change of attitude. There is recognition that the lives of people with disabilities are open to a broad range of opportunities—ones that are limited more by societal attitude than by individual impairment. Erving Goffman captured this view by stating, "Society establishes the means of categorizing persons and the complement of attributes felt to be ordinary and natural for members of each of these

---

<sup>41</sup> Using the New York City Public Schools as an example is not meant to suggest that they alone are changing the design of their services in response to the reauthorized IDEA. A similar comprehensive redesign is underway in the San Francisco, California, Unified School District.

categories.”<sup>42</sup> Deborah Stone describes how various academic disciplines frame disability, each according to its particular perspective:

Psychological analyses tend to regard [disability] as an individual experience, with an eye to understanding how physical and mental limitations interact with personality development. Economic analyses treat disability as a social position with its own income stream, much like a job, and seek to explain the extent to which individual choice determines the assumptions of the disabled role. Sociological analyses focus on the institutions that treat, house, and manage disabled people—including families, schools, hospitals, and rehabilitation clinics—and above all, they examine disability as a stigmatized social status, exploring the means by which stigma is created, maintained, and resisted.

....

... [A] political approach . . . explore[s] the meaning of disability for the state—the formal institutions of government, and the intellectual justifications that give coherence to their activities . . . . Why does the state create a category of disability in the first place, and does it design a workable administrative definition?<sup>43</sup>

School systems address disability both as a pedagogical matter—thus requiring special education—and as a means to ration scarce resources. Historically, that type of “special education” has been premised on a deficit model. Alternatively, Oliver Sacks has argued that disabilities “can play a paradoxical role, by bringing out latent powers, developments, evolutions, forms of life, that might never be seen, or even be imaginable, in their absence.”<sup>44</sup> Paul Longmore sees accommodations, adaptive devices, and services “as merely different modes of functioning . . . not inherently inferior.”<sup>45</sup> However, as Oliver Sacks writes, they are “no less human for being so different.”<sup>46</sup>

The issue, then, becomes what one does with difference, or in Martha Minow’s phrase, how one addresses the “dilemma of difference.”<sup>47</sup> Conceptualizing differences in a negative manner is endemic in school practice. This is evident in the procedures for “certifying” students as “disabled” and in need of special education services. Such procedures were established by federal mandates to challenge the exclusion of “different” people from schools and other public programs. A litany of “due process” requirements provides a facade of fairness, but insidiously perpetuates the stigma of difference. “Impartiality is the guise that partiality takes to seal bias

---

<sup>42</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2 (1963).

<sup>43</sup> DEBORAH A. STONE, *THE DISABLED STATE* 3–4 (1984).

<sup>44</sup> OLIVER SACKS, *AN ANTHROPOLOGIST ON MARS* xvi (1995).

<sup>45</sup> Paul K. Longmore, *The Second Phase: From Disability Rights to Disability Culture*, in *THE DISABILITY RAG AND RESOURCE*, Sept.–Oct. 1995, at 4, 6.

<sup>46</sup> SACKS, *supra* note 44, at xx.

<sup>47</sup> MINOW, *supra* note 17, at 19.

against exposure.”<sup>48</sup>

Alternatively, we can embrace the views of Temple Grandin, a biologist with autism:

[S]he thinks that there has been too much emphasis on the negative aspects of autism and insufficient attention, or respect, paid to the positive ones. She believes that, if some parts of the brain are faulty or defective, others are very highly developed—spectacularly so in those who have savant syndromes, but to some degree, in different ways, in all individuals with autism.<sup>49</sup>

Moved by her own perception of what she possesses so abundantly and lacks so conspicuously, Temple inclines to a modular view of the brain, the sense that it has a multiplicity of separate, autonomous computational powers or “intelligences”—much as the psychologist Howard Gardner proposes in his book *Frames of Mind*.<sup>50</sup> He feels that while the visual and musical and logical intelligences, for instance, may be highly developed in autism, the “personal intelligences,” as he calls them—the ability to perceive one’s own and others’ states of mind—lag grossly behind.<sup>51</sup>

The reauthorized IDEA offers the potential for fundamental change by doing the following: (1) improving attitudes toward student differences and disabilities; (2) establishing a mainstream that is flexible and accommodating, so that a wider range of students can be successful; and (3) holding school systems responsible for student learning instead of blaming the student.

## V. CONCLUSION

Despite the differences between the ADA and special education law, the following similarities are apparent: (1) the posture of the supporters; (2) the changes brought; and (3) the need for services as well as procedural and substantive rights.

In their legislative strategies, the supporters of both the Black and women’s civil rights movements downplayed the extent to which the broader society would be changed, at least in part not to frighten White male legislators. The talk focused on “leveling the playing field”; but in practice, the changes went beyond what was bargained for. So it is with the ADA and special education law.<sup>52</sup> There is talk of “leveling the playing field.” Yet, in practice, we must welcome a new understanding of difference—one that does not consider White, male, and able-bodied to be the only

---

<sup>48</sup> *Id.* at 376.

<sup>49</sup> See SACKS, *supra* note 44, at 253–55.

<sup>50</sup> HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983).

<sup>51</sup> SACKS, *supra* note 44, at 290.

<sup>52</sup> This was more the case with the initial special education law, Pub. L. No. 94-142 (1975), than in the reauthorized IDEA of 1997.

normal and good characteristics. We should make difference the common feature of humankind, as evidenced in the title of the persuasive article, *Impairment as a Human Constant*.<sup>53</sup>

Both the Black civil rights movement and the women's movement have brought deep changes to the country. Likewise, the ADA and special education have brought change to both individuals and society. In a recent presentation to those who monitor programs in the New York City Public Schools, as one of its program designers, I said, "the changes really are in general education. The shock will be more for them than those in special education." In a sense, that statement also applies to the ADA. The changes in the broader society were at least as much as the changes relating to individuals with disabilities. Thus, both the ADA and IDEA protect individual rights *and* change institutions. Yet much potential remains to be discovered; indeed, the potential is greatest when one examines the assumptions of an "abelist"<sup>54</sup> society, to use the term of the late Phyllis Rubinfeld.

Both the IDEA and the ADA need to offer services as well as procedural and substantive rights in order to function effectively. The IDEA offers services to children and procedural rights to their parents and guardians. It focuses on using the Early Intervention Program (EIP) as the primary tool to deliver programs to the individual student; institutional changes are addressed only indirectly.<sup>55</sup> The service approach has been a limit in the absence of a rights formulation. On the other hand, the ADA is about procedural *and* substantive rights. It focuses heavily on institutional change; for example, it requires the reconfiguration of busses and the establishment of new modes of communication. Perhaps the absence of a service component in the ADA will be recognized as a limit in the future.

---

<sup>53</sup> Jessica Scheer & Nora Groce, *Impairment as a Human Constant: Cross-Cultural and Historical Perspectives on Variation*, 44 J. SOC. ISSUES 23, 23 (1988).

<sup>54</sup> Rubinfeld's intended play on "racist" and "sexist."

<sup>55</sup> Assistance to the States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,405-12,454 (Mar. 12, 1999) (codified at 34 C.F.R. pts. 300, 303 (2000)).

**Where can you get back volumes  
and issues?**

**ORDER THROUGH HEIN!!**

We have obtained the entire back stock,  
reprint, and microform rights to...

---



## **OHIO STATE LAW JOURNAL**

---

Complete sets to date are now available.  
We can also furnish  
single volumes and issues  
in paper and microfiche formats.



*"Serving you for  
more than 75 years."*

### **WILLIAM S. HEIN & CO., INC.**

*Law: Publisher / Periodical Subscription Agent / Micropublisher / New, & Used Law Books*

1285 Main Street, Buffalo, New York 14209

716/882-2600 · Toll-Free 800/828-7571 · Fax 716/883-8100

E-Mail [WSHEINCO@CLASS.ORG](mailto:WSHEINCO@CLASS.ORG)

Home Page <http://lawlib.wuacc.edu/hein/heinhome.html>